SUPREME COURT, U.S.

73-773

FILED
JAN 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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MABEL McNEILL,

*Petitioner,*

v.

ROBERT EDWARD FISHER
and
CHARLES J. FISHER, JR.,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner Mabel McNeill prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above entitled case August 15, 1973, in the District of Columbia Court of Appeals, No. 7333-73, and the order and opinion of the Superior Court of the District of Columbia, No. CS 2780-71 entered in the above entitled case on February 5, 1973, nullifying a jury verdict of October 24, 1972.

## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App. A, infra), is not reported. The opinion and

order of the Superior Court of the District of Columbia (App. B, infra) are not reported. Copies of the opinion of the Court of Appeals and the opinion and order of the Superior Court have been filed as appendices to this petition for a writ of certiorari.

## JURISDICTION

The judgment of the District of Columbia Court of Appeals granting the motion to dismiss the appeal was entered on August 15, 1973, after appeal from the opinion and order of the Superior Court of the District of Columbia of February 5, 1973 granting a new trial on reasons which were not presented by respondents' counsel in his motion for a new trial and other reasons incorrect in the law, after a jury verdict on October 24, 1972.

Jurisdiction is based upon Rule 19(b) of the Rules of the Supreme Court of the United States in which a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The jurisdiction of this court is based upon 11 D.C. Code 102 declaring the District of Columbia Court of Appeals the highest court of the District of Columbia for purposes of further review by the Supreme Court and 11 D.C. Code 301 declaring that the District of Columbia Court of Appeals is not subject to review by the United States Court of Appeals, except in certain narrow circumstances not presented here. (As amended in 1970 by §172(a)(1) of the Reorganization Act, 84 Stat. 590, the term "highest court of the state" as used in 1257 includes the District of Columbia Court of Appeals.) The jurisdiction is also based on 28 U.S.C. 1257(3) as presenting federal constitutional issues which are re-

viewable by writ of certiorari. Jurisdiction of this Court is based upon the fact that the Supreme Court of the United States can examine not only the judgment and opinion but also any other pertinent fact within and without the record. *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 72 (1946). Jurisdiction is further based on the fact that the Court of Appeals dismissed the appeal, thus allowing the trial court's opinion to stand, that it would have given a judgment notwithstanding the verdict to the defendant had it been possible under procedural law (Ap. B, p. 3), that plaintiff was contributorily negligent as a matter of law which under the law of the District of Columbia makes the case final. Jurisdiction is based on the fact that these methods were used by the Trial Court in order that the court could substitute its judgment for that of the jury, an act forbidden by Amendment VII of the Constitution of the United States, and also on rules 59(d) and 7(b)(1) of the Civil Rules of the Superior Court of the District of Columbia. On page 68 and following of the petitioner's Court of Appeals' brief, the constitutional issue was raised.

## QUESTIONS PRESENTED

I. Whether under Amendment VII of the United States Constitution and sections 7(b)(1) and 59(d) of the Civil Rules of the Superior Court of the District of Columbia, the trial judge may substitute his judgment for the verdict of the jury 104 days after entry of judgment on the jury's verdict on the ground that the petitioner was contributorily negligent as a matter of law, when respondent's automobile hit petitioner's automobile in her street after coming from three hundred to three hundred and fifty feet away, skidding twenty-seven feet, jumping the curb into petitioner's street, pushing her

across the street up on the sidewalk almost a block from his original path and damaging petitioner's 1965 Mustang so that she received $15 for the wrecked automobile after paying $65.00 in storage charges or whether this is unconstitutional and an abuse of discretion.

II. Whether under Amendment VII of the United States Constitution and Sections 7(b)(1) and 59(d) of the Civil Rules of the Superior Court the trial judge may substitute his judgment for the verdict of the jury 104 days after entry of judgment by considering the evidence in the light most favorable to the respondent, when the jury verdict was for the petitioner.

III. Whether under Amendment VII of the United States Constitution and Sections 7(b)(1) and 59(d) of the Civil Rules of the Superior Court of the District of Columbia, the trial judge may substitute his judgment for the verdict of the jury 104 days after entry of the judgment on the basis that verdict was against the weight of the evidence when all the exhibits and all the witnesses and all the evidence was in favor of the petitioner and respondent gave testimony shown to be different from testimony he had sworn to previously and physically impossible of occurrence and had no witnesses or exhibits or whether this is unconstitutional and an abuse of discretion.

IV. Whether, under Amendment VII of the United States Constitution, and Sections 7(b)(1) and 59(d) of the Civil Rules of the Superior Court of the District of Columbia, the trial judge may substitute his judgment on February 5, 1973 for the verdict of the jury in an automobile accident case 104 days after entry of judgment on the jury's verdict on October 24, 1972 on bases which were not specified in a motion for a new trial or whether this is unconstitutional and an abuse of discretion.

V. Whether the right to jury trial is completely erased when a trial court is appointed by the President of the United States to serve for 15 years 11 D.C. Code 1501(a), 11 D.C. Code 1502 and can be removed from office by a five member Commission three of whom may be laymen, 11 D.C. Code 1522 (1973 Edition) and such trial court awards a new trial on reasons not based on law or fact, but on the fact that the respondent was a policeman and that the trial judge, as a member of the executive branch, in his own words stated "* * * I have been dealing with police officers for twenty years of my life and the term 'officer' is one to be proud of" (R., p. 267, Appeals Brief, p. 58) or whether such merging of executive and judicial with the elimination of the jury verdict completely destroys the independence of the judiciary and the right to a jury trial.

## CONSTITUTIONAL AMENDMENT AND COURT RULES INVOLVED

AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

*The Superior Court of the District of Columbia–Civil Rules provide in Section 59(d)*: 2. "*ON INITIATIVE OF COURT.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may

grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor"

and in Section 7(b)(1):

"An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state *with particularity* the grounds therefor, and shall set forth the relief or order sought." (Emphasis supplied)

## HIGHWAYS AND TRAFFIC REGULATIONS OF THE DISTRICT OF COLUMBIA

Article V, Section 21(a), *Reckless Driving*

"Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving."

Article VI, Speed Restrictions, Section 22a:

"No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

"b. Except when a special hazard exists that requires lower speed for compliance with subsection (a) of this section, the limits specified in this section or established as hereinafter authorized shall be the maximum lawful speeds and no person shall drive a vehicle on a street or

highway at a speed in excess of such maximum limits:

"1. Twenty-five miles per hour unless otherwise designated by official signs,"

Article XIV, Section 99(c)–

"An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

## STATEMENT OF THE CASE

In this automobile accident case the evidence showed that on October 21, 1970 petitioner, coming south on 17th Street, stopped at the stop sign at Minnesota Avenue, S.E., Washington, D.C., and could not see beyond the parked automobiles to her right (R. 116), so she stopped again and looked both ways (R. 26 and 27 and 116) and saw respondent on Minnesota Avenue to her right, beyond the S Street Triangle (R. 27, 28, 34, 118, 135) which accurate highway maps in evidence showed to be three hundred to three hundred and fifty feet from the intersection. (R. 153, 245, Pl. Exs. 46, 47, R. 143, 146). She knew she had "plenty of time to cross" (R. 117), but when petitioner was half-way across, she realized that respondent was speeding (R. 43, 44, 75, 121, 122, 136, 237), so she tried to speed up to get across and respondent would have missed her had he continued straight, but he was speeding and had so little control of his automobile that he started skidding 43 inches out from the curb, skidded twenty-seven feet (R. 167 to 170). Petitioner's witness Shepherd said twenty-seven inches by mistake, but Exhibits 11 to 23 were photographs which he identified as the skidmarks he measured (Pl. Exs. 11 to 23, R. 86, 89) and clearly showed it was 27 feet, especially since petitioner's witness Brown testified that the highway plats showed that the north side of the triangle at 17th and Minnesota

was 25 feet from p.c. to p.c. (defined as "where it stops curving and begins straight") (R. 155) and, of course, the highway maps were in evidence to verify this). Respondent skidded, jumped the curb at his right into petitioner's street (R. 35) and his automobile pushed her automobile thirty feet across her street, 17th Street, up on the sidewalk almost a block from respondent's original route of travel on Minnesota Avenue (55 feet were covered after impact if one counts the sidewalk. (R. 151). Petitioner's 1965 Mustang was so nearly destroyed that the storage charges were $65.00 after the accident and the garage paid petitioner $15.00 for the remains of the automobile (R. 105).

Petitioner's witness Telesford testified that she heard the crash, looked out and saw petitioner's Mustang on the sidewalk on the back part of the fence and showed the jury where that was on Exhibits 26, 27, 28, 30, (R. 139, 140, Pls. Ex. 28 to 30, R. 95, 97) which was away from Minnesota Avenue; the "front" part adjoined Minnesota Avenue where respondent was originally travelling.

Petitioner's witness Shepherd testified that he sold petitioner her automobile, so petitioner called him on the day of the accident. Petitioner also testified that she called him to see if the Mustang was worth "being repaired" (R. 84). Shepherd stated he observed the skid marks at noon the next day (R. 166) after the accident (October 22, 1970) and went back and measured them on October 26, 1970.

Petitioner's witness Telesford who lived in view of the accident site testified that there were no accidents on the day after the accident on October 21, 1970 in that area. (R. 139). Shepherd identified petitioner's exhibits 11 to 22 photographs of the skid marks he observed and measured (Pl. Exs. 11 to 22, R. 86, 89 R. 168 to 170),

and petitioner's exhibits 31 to 42 (Pl. Ex. 31 to 42, R. 101, 101) as photographs of Mrs. McNeill's automobile the way it looked the day he saw it after the accident (R. 171).

Respondent described what happened in the accident in a way contradictory of his description of the accident when he described the same accident on November 19, 1970, and marks which respondent made on two plats (Pl. Ex. 44, R. 144, 154 and Pl. Ex. 45, R. 144, 158), which were proven in scale by testimony of petitioner's witness Brown from the highway department from whose plats one Exhibit was traced and the other was measured, were testified to by petitioner and the plats, in evidence, as were the official highway department plats, proved the contradiction to the jury. After forty-eight minutes of deliberation, the jury gave a verdict for petitioner in the sum of $15,000.00 on October 24, 1970 (Appendix D). One hundred and four days later on February 5, 1973, the trial court handed down an opinion stating it desired to grant respondent's judgment notwithstanding the verdict (Ap. B. 3) but could not because of respondent's omission to seek a directed verdict at the close of the entire case and therefore it was granting a new trial on basis that petitioner was contributorily negligent as a matter of law, the verdict was against the weight of evidence and the conduct of counsel for plaintiff prejudiced defendants' presentation of their case.

Notice of appeal was filed March 5, 1973, petitioner's brief was filed whereupon respondents filed a motion to extend the time or dismiss the appeal and the District of Columbia Court of Appeals dismissed the appeal on August 15, 1973.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PROBLEM OF CONTRIBUTORY NEGLIGENCE.

The Trial Court found that the petitioner was contributorily negligent as a matter of law. (Ap. B, 5). This opinion on the issue of contributory negligence is erroneous and in conflict with the applicable decisions of this Court holding that on the question of whether a case is one for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to her that may be reasonably drawn from the evidence; that all conflicts in the evidence are to be resolved in favor of plaintiff and that the credibility of the witnesses and weight to be ascribed to their testimony are not for the court but for the jury and in the event any fair-minded and reasonable people may draw different conclusions from the evidence on any determinative issue, such issue is one of fact for the jury and not one of law for the Court.

In *Tennant v. Peoria and P. U. Ry. Co.*, 321 U.S. 29, 64 S.Ct. 409 and 488 L.Ed. 520 (1944), the Court

> granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation. (at p. 30)

and the Court stated (at p. 35),

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body.

> It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which in conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence merely because the jury could have drawn different inferences or conclusions or because judges feel other results are more reasonable.
>
> Upon examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.*

In *Lind v. Schenley Industries, Inc.*, 278 F.2d 49 (3 Cir.) (En banc), cert. denied 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960), the Appeals Court stated that reversal of an order for a new trial is possible (p. 88)–

> If an appellate court is shown special or unusual circumstances which clearly indicated an abuse of discretion in that the trial court failed to apply correctly the proper legal standards,

and on page 89–

> Since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict.

And in the Lind case, the conclusion was that subject matter of the litigation before them was (at p. 91),

> Simple and easily comprehended by an intelligent layman, and that the jury's main function was to

> determine the veracity of witnesses and the court concluded that the jury did believe the testimony and ruled that the court below substituted its judgment for that of the jury on this issue and thereby *abused its legal discretion.* The appeals court reinstated the jury verdict.

Petitioner submits that, in light of the applicable decisions of this Court, the trial court's ruling that petitioner was guilty of contributory negligence as a matter of law is plainly erroneous, and that by such ruling the Court usurped the function and authority of the jury.

The Court did not wish the petitioner to prevail for reasons which had nothing to do with the merits of the case. Two quotations from the transcript make this clear, as follows: (R. p. 89) when a member of the jury panel arose and stated, on voir dire, that he was a personal friend of two members of the law firm representing respondent, naming the friends, the following occurred.

> "THE COURT: The fact that you are a friend of Mr. Margallius and Mr. Greenstoln, I am sure they have very, very many friends, that fact that you are personally friends of theirs do you feel that that fact would prejudice you so that in the event you were selected as a juror in this case that you would be unable to render a fair and impartial verdict.
> THE JUROR: I think so.
> THE COURT: Well, it is not enough to think. You will have to tell me yes or no.
> THE JUROR: It would not.
> THE COURT: Thank you very much.
> MRS. PERRY: Your Honor, I ask that he be stricken.
> THE COURT: That's denied."

Fortunately, Mr. Kipnis did not sit on the jury, but the attitude of the court is shown by that incident and its statement (R. 267) "I have been dealing with police officers for twenty years of my life and the term officer is one to be proud of" (respondent was a police officer).

No disrespect is meant to the trial court herein when it is pointed out that the court rendered lip service to the rule that in considering whether respondent's motion for a new trial should be granted, the court is required to consider the evidence and all reasonable inferences therefrom in the light most favorable to petitioner, but utterly failed to apply the rule to the facts of the record before the Court, utterly failed to realize that a proper application of the principles hereinabove stated to the evidence adduced would compel a holding that the issue of contributory negligence was one for the jury and was concluded by the jury's verdict.

The trial court did not consider the trial testimony at all except to characterize it as consistent with the deposition (Ap. B. 6). It is petitioner's understanding that no transcript was made of any part of the court proceedings until after the trial court's opinion came out 104 days after the jury verdict and petitioner ordered the transcript.

*First*, if it is so clear that petitioner was contributorily negligent as a matter of law, and that reasonable minds could not differ, why did the court not rule to that effect during the trial and take the matter away from the jury? If it is not so clear, the matter is one of fact for the jury to determine. *Carter v. Singleton*, 219 A.2d 114 (1966).

*Secondly*, if it is so clear that petitioner is contributorily negligent as a matter of law and that reasonable minds could not differ, why did the trial court take 104 days after entry of judgment to rule on a matter which

was so evident. If it is not so clear, the matter is one of fact for the jury to determine. (*Carter v. Singleton, supra*).

Finally, the trial court's discussion in its opinion clearly demonstrates that it considered the evidence in the light most favorable to respondent, not petitioner as required.

## II.

### THE PROBLEM OF WHETHER THE COURT ON A MOTION FOR A NEW TRIAL MAY CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO RESPONDENT.

For example, the trial court pointed out it was raining hard enough to require the use of petitioner's windshield wipers. The evidence most favorable to petitioner would have been as follows: "It was raining moderately (respondent's testimony, R. 229), but it wasn't hard to see (petitioner's testimony, R. 115) and petitioner could see respondent beyond the S Street Triangle (R. 27, 28, 34, 118, 135) 300 to 350 feet away (R. 153, Exs. 46 and 47). Respondent left 27 feet skid marks, photographs of which were in evidence, indicating his automobile was gripping the ground then and respondent testified he thought his brakes gripped the street (R. 195), thus proving that the rain did not decrease the visibility nor increase the tendency to skid.

The trial court stated (Ap. B. 6 & 7) that petitioner saw respondent's vehicle from right but could not say how fast the car was approaching, she decided she had enough time to clear the intersection, that midway she looked again and had no idea how fast the car was going. The evidence most favorable to petitioner would have been that she saw respondent 300 to 350 feet away, that

as she had stopped at the stop sign she could not have been going rapidly and under the distances left to travel by respondent up Minnesota and petitioner across Minnesota subtracting the width of the parked car, respondent would have had to travel between forty and forty-five miles per hour just to reach the intersection but he braked, still had enough force to skid twenty-seven feet, jump the curb into petitioner's street, push petitioner's automobile 55 feet from curb to sidewalk, doing total or very nearly total damage to petitioner's car, which car ended up almost a block from respondent's path, if he had driven straight ahead on his road. The posted speed limit was twenty-five miles per hour.

It is not accurate for the trial court to say that midway through the intersection petitioner had no idea how fast respondent's car was going or that she estimated his speed to be *between* 35 and 45 mph. (Ap. B. 7 and footnote 4). Petitioner testified that he was doing *over* 35 or 40 (R. 44), that he was coming *so fast* (R. 75, 121, 237) speeding (R. 136), faster than I realized (R. 44) and speeding (R. 44).

In its opinion the trial court never mentioned the skid marks, the damage to the automobiles, the jumping of the curb, *Knox v. Arowsky,* 116 A.2d 406 (D.C. Mun. App. 1955), the fact that respondent hit petitioner's automobile in petitioner's street and almost a block from her original route, shoved her fifty-five feet up on the opposite sidewalk, all of which verify that if respondent had been going the posted rate of 25 mph or even just continued straight, petitioner would not have been hit. She was not contributorily negligent for not guessing he would speed and behave in this erratic way following her into her street.

Again the trial court gave lip service (Ap. B. 7, note 5) but did not follow *Carter v. Singleton,* D.C. Ap. 219 A.2d

114 (1966), the leading case in the District of Columbia. The court relied on *Smith v. D.C. Transit*, 153 A.2d 658 (D.C. Mun. App. 1959), a minor case with an unusual fact situation (distinguished below) which case is cited in our jurisdiction only by *Carter v. Singleton* which distinguished it. *Carter v. Singleton* states, at p. 115:

> "We have ruled on many occasions that ordinarily questions of negligence and contributory negligence in automobile collision cases, are questions for the jury. Only in the exceptional case *where the facts are undisputed,* and where but one reasonable inference can be drawn, is the Court justified in holding that negligence or contributory negligence has been established as a matter of law." (Emphasis supplied)

Again:

> "Appellant stopped and looked. He saw the other vehicle approaching at a distance and speed which he though made it safe for him to cross. The fact that he was struck before clearing the intersection does not establish his negligence as a matter of law. He made a decision which motorists at intersections are required to make daily. Whether his decision was negligently or carelessly made was a question for the jury."

The *Smith* case (supra) differs from this case in the following ways:

1. Plaintiff said he saw the car to his right 250 to 300 feet *which the court plainly did not believe.* In this case petitioner here saw the car 300 to 350 feet away.

2. Plaintiff stated that when he saw the bus he thought he could "beat it." In this case petitioner specifically stated that she was not trying to beat respondent across the intersection. (R. 122)

3. Plaintiff came around two stopped cars at a speed of 35 to 40 mph. In this case petitioner was alone at a stop sign at which she stopped twice.

4. The accident happened in the intersection. In this case the accident happened in petitioner's street.

5. There was no evidence defendant was speeding. In this case the distance respondent covered, the route he traveled, the curb he jumped, the distance he skidded, the distance he pushed petitioner, all proved he was speeding.

The trial court also relied on the *Phillips v. D.C. Transit System, Inc.*, 198 A.2d 740 (DCCA 1964), but it is not in point because Phillips involved a plaintiff failing to stop and look, or looking and failing to see what should have been seen (*Carter v. Singleton*, 219 A.2d 214), and in this case petitioner looked and saw and knew she had "plenty of time to cross." Petitioner saw respondent 300 to 350 feet away, respondent came from the left hand lane, respondent's brakes started gripping 43 inches out from the curb, he jumped the curb and hit her automobile in her street across 17th Street onto the sidewalk, the opposite end of the city block from Minnesota where respondent was originally travelling.

Again, the trial court gave lip service to but did not follow nor distinguish the result in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960), cert. denied 364 U.S. 835, in which the court concluded that the district judge had substituted his judgment for that of the jury, thereby abusing his discretion, and that the case was remanded back with instructions that the original verdict and judgment be reinstated. See *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967), cert. denied, 389 U.S. 913) at p. 55. The Duncan case was an automobile accident case which the court called a "prime example of subject matter lying well within the comprehension of jurors."

On its opinion stating that petitioner was contributorily negligent as a matter of law, the trial court quoted only the deposition and in its anxiety to have the appellant contributorily negligent and thus a final judgment for the respondent (*Rogers v. Cox*, 75 A.2d 776, at p. 778, D.C. Mun. App. 1950), the trial court quoted parts of the deposition never even introduced into evidence starting with "Were you going straight across" and ending with, "But he come straight down slanting into his right, to the curb."

The trial court inferred that petitioner knew when she first came out that she was taking a chance which she denied.

> "MR. RYDER: You didn't decide to just take a chance and try and beat him across the intersection? MRS. McNEILL: No." (R. 122, line 4)

and it was the prerogative of the jury to believe her.

## III.

## THERE ARE NO GROUNDS ON WHICH TO BASE THE STATEMENT THAT THE VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE.

Petitioner had four witnesses, forty-eight exhibits and testified herself extensively and repeatedly. Respondent had no witnesses, one exhibit and his testimony was contradictory to his previous testimony and, in at least one instance, impossible to be true.

The facts set forth in Statement of the Case (supra) prove conclusively that the verdict was fully in accordance with the weight of the evidence.

As Augustus Hand stated in *Pettingill v. Fuller*, 107 F.2d 933 (CCA 2nd Cir. 1939), at p. 934,

"It is quite plain that there was no ground for setting aside the verdict rendered on the first trial because it was contrary to the weight of evidence and the statement to that effect in its opinion on the motion to set the verdict aside was not justified by the record."

## IV.

## IS IT UNCONSTITUTIONAL AND AN ABUSE OF DISCRETION FOR THE COURT TO ORDER A NEW TRIAL 104 DAYS AFTER ENTRY OF JUDGMENT ON MATTERS NOT SPECIFIED IN RESPONDENTS' MOTION FOR A NEW TRIAL AND NOT BASED ON FACT OR LAW?

### A. Conduct of Petitioner's Counsel Was Proper.

In order not to turn a grave constitutional issue, the emasculation of the jury trial which can destroy the structure of our society into a private, unseemly altercation between Bench and Bar only one sentence will be written in a personal vein. Petitioner's counsel has been in the sole, private general practice of law since August 1957 (having practiced a year and a half as a government lawyer previous to that time) and has never before this case had any difficulty with the courts in Municipal Court, the Court of General Sessions, Superior Court, District Court or the various administrative agencies, and has had good results for her clients.

This matter would not have been touched at all were it not listed by the trial court as a basis for a new trial.

#### (1) *The Jury based its verdict on Proper Considerations.*

Not a particle of specific evidence was offered and no showing of any other kind was made by the trial judge to

support statement that the inability of petitioner's counsel generated "unacceptable sympathy on the part of the jury" for petitioner's cause.

There is not a particle of doubt that the trial court wanted a different result in this case nor is there a particle of evidence that the jury disregarded the trial court's instructions as to contributory negligence (Ap. B. 8). All outward evidence available showed that the jury performed its function with careful deliberation. At the beginning of its deliberations, the jury sent out a note which stated,

> "If it is found for the Plaintiff does the jury determine the sum for injuries, etc. If it is found for the Defendant, would any sum be involved? Foreman, George Coates." (R. 296, 298)

thus indicating that the jury was weighing both sides of the case presented to it; furthermore, when the trial judge did not understand the verdict of "I find the Defendant guilty" (R. p. 299) and an exchange followed (R. p. 299, indicating that the foreman did not understand what defendant and plaintiff meant but knew he had a verdict for Mrs. McNeill for $15,000.00), a juror corrected the trial judge's misunderstanding that "That's not it, it's in favor of the Plaintiff. We didn't understand the question. We found the Defendant to be guilty. We found for the Plaintiff a sum of money," (R. 301) and the jury was polled and they all stated agreement of a verdict in favor of Mrs. McNeill for $15,000.00 (R. 302, R. 303).

The jury deliberated for 48 minutes (Ap. D) which was certainly an adequate time where the evidence, photographs and witnesses were so much on the petitioner's side and respondent offered nothing but his own contradictory statements.

In *Marshall's U.S. Auto Supply v. Cashman,* 111 F.2d 140 (10th Cir. 1940) (cert. denied 311 U.S. 667), it was stated (on p. 142),

> The second ground in the motion was mistake and prejudice on the part of the jurors. Mistake and prejudice in what respect? Nothing whatever was set up. The entire proceedings had upon the first trial are in the record, and a careful examination of them fails to indicate any basis whatever for the contention that the verdict resulted from either mistake or prejudice. On the contrary the evidence discloses adequate basis for the verdict, without mistake or prejudice of the jury. *Mistake or prejudice of the jury cannot be asserted with success in a motion for a new trial or found by the court unless predicated upon some fact or circumstance from which it can reasonably be found or inferred.*" (Emphasis supplied)

(2) *Respondent's Motion for a New Trial Did Not Specify Errors of Petitioner and Therefore Basis for a New Trial Was Not Preserved for 104 Days.*

Respondents did not specify any errors committed by petitioner's attorney but only made a general statement in its motion for judgment notwithstanding the verdict, a new trial and a remittitur, (Ap. C, paragraph III) and therefore this reason for a new trial was a nullity because Superior Court of the District of Columbia Civil Rule 7(b)(1) states an application for a court order "must state with particularity the grounds therefor" and the requirements for particularity under rule 7 are real, substantial and mandatory and the court must throw out reasons for a new trial which are not particular. *U.S. v. 64.88 Acres of Land,* 25 FRD 88 (W.D. Pa. 1960).

The trial judge did not have jurisdiction to grant a new trial on his own initiative on the basis of petitioner's attorney's actions during the trial because the ten day limitation under rule 59(d) of the Civil Rules of the Superior Court had passed when the trial court granted a new trial 104 days after entry of judgment. See *Marshall's U.S. Auto Supply, Inc. v. Cashman,* 111 F.2d 140 (10th Cir. 1940) and *Chicago and North Western Railway Co. v. Britten,* 301 F.2d 400 (1962) at p. 402, where motions for new trial are no more than barren assertions–completely unbuttressed by the particulars required in Rule 7(b)(1) "where such type grounds were analyzed, discussed and rejected as inadequate, the granting of a new trial based thereon is an abuse of discretion."

Although the trial court stated in its opinion that petitioner's counsel's errors compelled proper objections from respondents' counsel (Ap. B. 12), it never detailed one error with the proper objection. (As pointed out in Attachment A of the Appeals Court brief, respondent's counsel approached the bench ten times and was fully sustained once if such record can be characterized as "compelling proper objections" from respondent's counsel. (Ap. B. 12)

Respondent's counsel's continuing objections were actually continuing attempts to have a mistrial declared, the first attempt of this nature came during petitioner's opening statement! (R. 17)

(3) *Eleven Photographs of Skidmarks Were in Evidence and the Trial Court Never Characterized Them as Irrelevant During the Trial.*

In its opinion offering a new trial, the trial court states (Ap. B. 13) that the Court informed petitioner that the skid marks were irrelevant, on the contrary, the court

admitted them into evidence. (Pl. Exhibits 11 to 23, R. 86, 89). [This matter was again not brought up within the timely ten days under 59(d) (Appendix C)]. When the trial court was told the photographs were offered to show the skid marks of respondent's automobile the court stated–"it is the jury's recollection which prevails." (R. 132)

The trial court in its opinion states (p. Ap. B. 13 to 14), "It is seriously doubted that the jury heeded the Court's instruction and counsel's argument to the jury respecting the skid marks." *The Trial Court never gave such instructions.* Its instructions run from page 268 to page 295 of the transcript and the only instructions on the skid marks are all on page 286 to the effect that the jury is "*the sole judge and finder of fact* whether or not any witness having personal knowledge of these skid marks came here and testified to you as to who laid down skid marks in those photographs." (Petitioner, witness Shepherd, witness Telesford and Respondent all helped tie the skid marks to Respondent).

The court further instructed that for skid marks to constitute negligence "they must be induced by negligent act or motion." The existence of this negligent act was within the jury's prerogative to find.

(4) *The Damages Poster Was Never Seen by the Jury and All Items of Damages on It Were Proved.*

The damages poster, being under books and exhibits, was *never seen by the jury* (R. 218) because once petitioner realized that respondent was trying to use it as a vehicle to bring about a mistrial and the trial court would not make a definite ruling on the poster, although asked (R. 217) petitioner's counsel did not show the

poster to the jury. She never attempted to introduce it into evidence.

*Moreover, all items on the poster had been proved* (R. 81, 78, 105, 48, 106, 84, 104, 105, 162, 172, 173).

(5) *It Was Not Reversible Error to Object to the Instruction on Unavoidable Accident Because It Was Improperly Given.*

The trial court improperly gave the instruction for unavoidable accident under the leading case in this jurisdiction. (*Sadorus v. Wood,* 230 A.2d 478, D.C. App. 1967), at p. 481. "The additional instruction on unavoidable accident was confusing and misleading to the jury, and it certainly was not required to fairly outline the real issues."

(6) *There Was No "Formula of Her Own Making."*

The formula of her own making objected to by the trial court (Ap. B. 13), is the mathematical certainty that one mile per hour equals approximately one and a half feet per second, a proven fact which is used in automobile cases by Bench and Bar alike and which the trial court specifically gave petitioner's counsel permission to argue to the jury. (R. 203)

(7) *The Traffic Hearing Was Mentioned* Before the Jury Only In Final Agruments *to State That Respondent Stated His Father Was Part Owner of the Car (R. 253) A Matter Decided by the Court as True as a Matter of Law. (R. 287, 288).*

### B. The Trial Court's Grant of a New Trial Was Not Timely Under the Superior Court–Civil Rules 7(b)(1) and 59(d).

In the trial court's reasons for a new trial, the matter of the traffic hearing was not brought up within the timely ten days (Appendix B and C) nor was the matter of the skid marks (Appendix B 14 and C) nor was the matter of the damages poster (Appendix B 14 and C) nor was the matter of the formula of her own making (Appendix B 14 and C) nor was the allegation that petitioner objected improperly to the instruction on unavoidable accident (Appendix B 14 and C) (Superior Court of the District of Columbia Civil Rule 7(b)(1) and 59(d)). The Court abused its discretion in granting a new trial on these grounds.

It is obvious that in granting a new trial 104 days after the verdict the trial court no longer remembered what happened in the case and that "if a case is to be retried it must be done with dispatch, lest the error or delay outweigh the error of trial." *Kanatser v. Chrysler Corp., et al.*, 199 F.2d 610 (10th Cir. rehearing denied Oct. 22, 1952 cert. denied, 364 U.S. 835).

## V.

## PETITIONER HAS BEEN DEPRIVED OF HER RIGHT TO A JURY TRIAL UNDER AMENDMENT VII OF THE CONSTITUTION OF THE UNITED STATES.

An order granting a new trial which is normally interlocutory is treated as an appealable final order, when that is its true effect. *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3rd Cir. 1962), quoting *Phillips v. Negley* (1886), 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed.

1013. This court has the power to examine not only the judgment and opinion but any other pertinent fact within or without the record. *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 72 (1946). Under the law of this jurisdiction, the finding of contributory negligence as a matter of law is a final decision, making the granting of a new trial a nullity (*Rogers v. Cox,* supra), and taking the matter from the jury or preventing it from going to the jury. The manner in which this was done by the trial court in this case on grounds which are procedurally and legally unsound is a usurpation of the right of jury trial.

Particularly in cases involving policemen, the citizens of the District of Columbia will no longer be able to secure the jury trial guaranteed to them by Amendment VII of the Constitution of the United States, if this abuse of discretion and usurpation of the function of the jury by the trial court are permitted to stand.

This is a particularly drastic threat to the liberty of the citizens of the District of Columbia because their judges are nominated by the President of the United States to serve for fifteen years, 11 D.C. Code 1501(a), and 11 D.C. Code 1502 (1973 Edition) and can be removed from office by a five member commission, three of whom may be laymen 11 D.C. Code 1522 (1973 Edition), and is a drastic step beyond *Palmore v. United States,* 411 U.S. 389 (1972), with dissents, into the precipice of no jury trial at all and the merging of the executive branch of our government with the judicial. When the judge is appointed by the executive from the executive branch for less than a lifetime, in cases involving policemen who are also in the executive branch and thereafter arbitrarily overthrows the verdict of the jury 104 days after it is entered on a basis and in a time not sanctioned by its rules of procedure [(59(d) and 7(b)(1)–Superior Court

of the District of Columbia–Civil rules] or the case law of the jurisdiction (*Carter v. Singleton, supra*), there is not a shred of a right to a jury trial remaining to a citizen of the District of Columbia.

Due to the number of automobile accidents involving policemen in the District of Columbia and the practical inequality between laymen and policemen when it comes to locating, preserving and presenting evidence, the deprivation of the right to a jury trial leaves many, many citizens of this jurisdiction without protection of any kind.

## CONCLUSION

The decision of the trial court and the dismissal of the appeal by appeals court below constitute an unwarranted and drastic usurpation by the trial court of petitioner's constitutional right to a jury trial. Accordingly, this petition for writ of certiorari should be granted so that the jury verdict for petitioner against both respondents in the amount of $15,000.00 can be reinstated and judgment entered accordingly.

Respectfully submitted,

ROTRAUD M. PERRY
501 "D" Street, N.W.
Washington, D.C. 20001
*Attorney for Petitioner*

November 13, 1973

## APPENDIX A

***DISTRICT OF COLUMBIA***
***COURT OF APPEALS***
[Filed Aug. 15, 1973]

No. 7333 January Term, 1973

MABEL McNEILL,
Appellant,
v. CA-2780-71

ROBERT EDWARD FISHER
and CHARLES J. FISHER, JR.,
Appellee.

BEFORE: Fickling, Gallagher and Yeagley, Associate Judges.

ORDER

On consideration of appellees' motion to dismiss the appeal or alternatively to extend appellees' time to file brief, the opposition of the appellant thereto, it is

ORDERED that the motion to dismiss the appeal be, and the same hereby is, granted and the appeal in this case is dismissed.

PER CURIAM.

Copies to:

Honorable Joseph M. Hannon
Judge, Superior Court of the
District of Columbia.

Clerk, Superior Court of the
District of Columbia.

Attorney R.M. Perry
501 D Street, N.W. 20001
Attorney for Appellant.

James L. Rider, Esquire
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Attorney for Appellee.

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## APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
[Filed Feb. 8, 1973]

| | | |
|---|---|---|
| MABEL McNEILL, Plaintiff, | ) | |
| v. | ) | Civil Action No. CA 2780-71 |
| ROBERT EDWARD FISHER and CHARLES J. FISHER, JR., Defendants. | ) | |

### OPINION

I.

This matter is before the Court upon defendant's motion for judgment notwithstanding the verdict or for new trial. Alternative to this relief defendants ask for a remittitur of the jury verdict which is in the amount of $15,000.00.

The action arose out of a collision involving an automobile owned and driven by plaintiff Mrs. Mabel McNeill and another vehicle co-owned by defendants Charles J. Fisher, Jr. and his son, Robert Edward Fisher. Robert was driving the Fisher vehicle at the time of the accident. Plaintiff has named both Fishers as defendants.

The collision occurred on October 21, 1970 at approximately 3:00 P.M. at the intersection of 17th Street and Minnesota Avenue, S.E. At the time, it was

raining and street surfaces were wet. Plaintiff Mrs. McNeill approached the intersection on 17th Street while Mr. Fisher, driving the favored vehicle, was approaching on Minnesota Avenue. Plaintiff stopped at the stop sign which controls 17th Street and looked both ways for oncoming traffic. Because cars were parked on Minnesota Avenue, plaintiff moved out a distance from the stop sign to get a better look at approaching traffic. She saw the Fisher vehicle, but believing she had enough time to cross Minnesota Avenue, she entered the intersection. While moving through the intersection she again observed the Fisher car which then appeared to be coming at a greater rate of speed than she had originally estimated. Plaintiff thereupon accelerated her vehicle in an unsuccessful effort to cross the intersection.

The case was tried before a jury, which after hearing all the evidence and receiving instructions from the Court, returned a verdict in favor of Mrs. McNeill against both defendants in the amount of $15,000.00. Judgment was entered on October 24, 1972. On November 1, 1972 defendants filed their motion for judgment n.o.v., or in the alternative, for a new trial. They also requested relief from the judgment by way of remittitur.

Upon consideration of all the evidence and plaintiff's opposition to these motions, and the Court being fully informed, defendants' motion for judgment notwithstanding the verdict is denied for lack of jurisdiction. Defendants' alternative motion for a new trial is granted for the reasons that (1) plaintiff was contributorily negligent as a matter of law, (2) the verdict of the jury is against the weight of the evidence and (3) the verdict of the jury, which does not lend itself to "logical analysis",[1]

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[1] *Law v. Virginia Stage Lines, Inc.*, 114 U.S. App. D.C. 115, 444 F.2d 990 (1971).

could only have been based upon compassion and sympathy for plaintiff, prejudice against defendant or mere whim. Irrespective of which of these factors motivated the jury, it is the responsibility of the trial judge "to correct juries who base their verdicts on considerations not embodied in the evidence."[2]

Defendants' motion for remittitur of the jury verdict is denied as moot in view of the grant of a new trial.

## II.
## The Court Lacks Jurisdiction to Consider Defendants' Motion for Judgment Notwithstanding the Verdict

The Court has carefully considered the entire trial record of this proceeding for the purpose of ruling upon defendants' motions. As will be more fully explained below, a realistic appraisal of all the evidence demonstrates clearly and unequivocally that plaintiff was contributorily negligent as a matter of law, if not solely negligent, in connection with the complained of collision. The negligence of plaintiff in the operation of her motor vehicle is so patent that no possible difference of opinion respecting that negligence could arise among reasonable men. An attempt to ferret out a rational basis for the action of the jury in returning its verdict in favor of plaintiff has proved unsuccessful. It would seem logical, therefore, to grant defendants' judgment notwithstanding the verdict. However paradoxical as it may appear, the Court is powerless to grant defendants' motion for judgment n.o.v. inasmuch as the authority of the Court to act is limited by the procedures which occurred during

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[2] *Id.*

the trial and the provisions of Rule 50(b) of the Superior Court Rules of Civil Procedure.

Rule 50(b) permits a motion for judgment notwithstanding the verdict to be filed within 10 days after entry of judgment. The rule specifically recites that only a party who has moved for a directed verdict at the close of all the evidence shall be permitted to make such a motion. Unless timely filed and unless the party filing the motion has moved for a directed verdict at the close of all the evidence, the motion is ineffectual and the Court lacks jurisdiction to entertain it. *Brandon v. Yale & Towne Manufacturing Co.*, 220 F. Supp. 855 (E.D. Pa. 1963) *affirmed* 342 F.2d 519 (3d Cir. 1965); *American National Bank & Trust Co. v. Dean*, 249 F.2d 83 (6th Cir. 1957); *Harmon v. Liss*, D.C. Mun. App., 116 A.2d 693 (1955); *Nickel v. Scott*, D.C. Mun. App., 59 A.2d 206 (1948).

The record in this case reflects that defendants moved for a directed verdict at the close of plaintiff's case. This motion was denied because in the course of cross-examination of one of plaintiff's witnesses defendants introduced an exhibit into evidence. This action, intentional or not, amounted to an opening of the defendants' case and a waiver of their right to seek a directed verdict at that stage of the trial. *Holmes v. Hinton*, D.C. Mun. App., 170 A.2d 924 (1961). After defendants presented their own case they did not renew their motion for a directed verdict.[3]

In view of defendants' omission to seek a directed verdict at the close of the entire case the motion for

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[3]Trial judges are urged by appellate tribunals to take such actions under advisement except in circumstances where it is absolutely clear the motion should be granted. *Resnick v. Wolfe &*

judgment notwithstanding the verdict must be denied. *Shreve v. Hot Shoppes, Inc.*, 184 F. Supp. 46 (D.D.C. 1961), *affirmed*, 110 U.S. App. D.C. 268, 292 F.2d 761 (1961). See also 5A Moore Federal Practice § 50.08 (2d ed. 1953).

## III.
## Defendants are Entitled to a New Trial for the Reason that Plaintiff Was Contributorily Negligent as a Matter of Law and the Verdict of the Jury Was Against the Weight of the Evidence.

In considering whether defendants' alternative motion for a new trial should be granted the Court is required to consider the evidence and all reasonable inferences deducible therefrom in the light most favorable to plaintiff. *McCarthy v. Cahill*, 249 F. Supp. 194 (D.D.C. 1966); *Kerlin v. Washington Gas Light Co.*, 110 F. Supp. 487, *affirmed* 94 U.S. App. D.C. 39, 211 F.2d 649 (1953). In connection with the instant action and in fulfillment of this requirement the Court is not required to ignore plaintiff's own declarations respecting how the collision occurred. Her statements, under oath in the form of a deposition, were offered into evidence by

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*Cohen, Inc.*, D.C. Mun. App. 49 A.2d 809, 811 (1946); *District of Columbia v. Jones*, D.C. Mun. App. 265 A.2d 594 (1970). After return of the jury verdict the trial Court may then grant a party's motion for a directed verdict or a motion for judgment notwithstanding the verdict filed within 10 days after entry of the judgment. The practice which has been fostered in the interest of judicial economy is a salutary one. The risks such as occurred here are minimal. See *Chavis v. Commercial Storage, Inc.*, Sup. Ct. D.C. Civil No. 284-72, December 7, 1972, at 4.

defendants as declarations against interest. The Court received them as such and they reflect that after stopping for a stop sign on 17th Street, S.E. plaintiff pulled out into the intersection to obtain a better view of oncoming traffic. She thereupon observed defendants' vehicle approaching and according to her deposition testimony the following occurred:

Q. And so what did you do?

A. Well, I though [*sic.*] I had plenty enough time, so I just went on, was trying to get across, and I looked again.

Q. Were you going to go straight across?

A. Yes.

* * * * *

she entered the intersection and about midway through she again looked at defendant's approaching automobile; that she had no idea at this point how fast defendant's car was going[4] and she thereupon speeded up to try to get across Minnesota Avenue.

Viewing plaintiff's testimony along with the balance of the trial testimony going to the merits in the light most favorable to her, no other conclusion than that plaintiff was contributorily negligent as a matter of law can be culled from the record.

Plaintiff's counsel in opposing defendants' motions for judgment n.o.v. or for a new trial reminds us, however, of our Court of Appeals oft-repeated admonition that trial judges should leave issues of negligence and contributory

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[4] At one point in her testimony, however, plaintiff testified that when she was in the middle of the intersection she saw defendant approaching and estimated his speed to be between 35-40 miles per hour.

negligence to the jury.[5] In the case relied upon by plaintiff the Court of Appeals also noted that in the exceptional case, where but one reasonable inference can be drawn, the trial judge is justified in withholding the action from the jury. This is such a case.

In concluding that defendants' motion for a new trial should be granted for the reason of plaintiff's contributory negligence the Court is sensitive to the fact that the grant of a new trial could be "a derogation of the jury function,"[6] and that "under the influence–if not the command–of the Seventh Amendment, . . . decisions of disputed questions of fact [are for] the jury."[7] Accordingly the trial judge has a heavy responsibility to avoid an abuse of the legal discretion vested in him when dealing with motions for new trials. In *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir., 1960), *cert. denied* 364 U.S. 835, the Court stated:

> But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the

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[5] In *Carter v. Singleton*, D.C. App., 219 A.2d 114 (1966) cited by plaintiff the Court said at p. 115:

> We have ruled on many occasions that ordinary questions of negligence and contributory negligence, especially in automobile collision cases, are questions for the jury. Only in exceptional cases, where the facts are undisputed and where but one reasonable inference can be drawn, is the Court justified in holding that negligence or contributory negligence has been established as a matter of law.

[6] *Bennett v. D.C. Transit System*, 111 U.S. App. D.C. 411, 298 F.2d 325 (1962), Fahy, J., concurring in part and dissenting in part, at 111 U.S. App. D.C. 413.

[7] *Byrd v. Blue Ridge Rural Electric Co-op.*, 356 U.S. 525, 538 (1958).

> evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

But where, as here, the plaintiff's negligence is reflected by the fact that she took a chance and lost, it is the duty of the Court to set aside the jury verdict which reflects a total disregard of the Court's instructions relating to contributory negligence.

The decision here made to grant a new trial to defendants because of plaintiff's apparent negligence is supported by *Smith v. D.C. Transit*, D.C. Mun. App., 153 A.2d 658 (1959), where the facts show plaintiff had stopped at a stop sign, looked in both directions and had seen a bus approaching some 250-300 feet away. Notwithstanding the approaching bus plaintiff in that case proceeded into the intersection and was struck by the bus. In the course of his testimony upon cross examination plaintiff in that action admitted he tried to "beat" the bus. Our Court of Appeals declared at p. 660:

> [W]hether or not appellant was correct in his estimate that the bus, when first observed by him was 250-300 feet away, it was so close as to make dangerous an attempt to cross in front of it; and that in attempting to "beat" the bus, he took a chance and assumed the risk of a collision.

Similarly in *Phillips v. D.C. Transit System, Inc.*, D.C. App., 198 A.2d 740 (1964), the Court stated at p. 741:

> Even if we assume there was primary negligence on the part of the bus driver, there can be no doubt from all the testimony that had appellant looked effectively to the right before leaving the "Stop" sign and entering the intersection, she would have seen the bus coming toward her at a distance that was an immediate hazard and should have yielded the right-of-way in compliance with the traffic regulation. Her failure to do so was negligence as a matter of law contributing as a proximate cause to the collision between the two vehicles, and hence bars her right to recover . . . .

Finally, Section 48 of the Traffic and Motor Vehicle Regulations provides:

> Except when directed to proceed by a police officer or a traffic control signal, every driver of a vehicle approaching an intersection at which an official "Stop" sign has been erected shall come to a complete stop and after having stopped shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time that such vehicle is moving across or within the intersection.

In view of what our Court of Appeals has observed in the *Smith* and *Phillips* cases and the provision of Section 48 of the Traffic Regulations, no other conclusion is possible other than that plaintiff Mrs. McNeill was negligent as a matter of law in the operation of her motor vehicle. For this reason she should not have prevailed in this action. Where in considering a motion for a new trial the Court is satisfied that the verdict returned by the jury

is contrary to law it is mandatory for the Court to grant a new trial. *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95 (1931); *Frye v. Lyon*, 55 U.S. App. D.C. 48, 299 F. 926 (1924).

In view of the Court's finding that plaintiff's conduct was negligent as a matter of law, and a weighing of the evidence which preponderates so heavily in favor of defendants it follows, *a fortiori*, that for this reason too, defendants are entitled to a new trial. *Eastern Airlines, Inc. v. Union Trust Co.*, 99 U.S. App. D.C. 205, 210, 239 F.2d 25, 30, *cert. denied*, 353 U.S. 942 (1957).

It is improbable, should this action eventually find its way to our Court of Appeals, that that Court would differ with the action taken here in granting a new trial. However remote such a ruling may be, it still must be recognized that the Court of Appeals in its wisdom could disagree with the stated reasons for granting a new trial and reinstate the $15,000 verdicts which the jury returned against these defendants.

For this reason this Court now must express, however reluctantly, its final reasons for ordering a new trial in this cause.

## IV.
## Conduct of Plaintiff's Counsel Mandates a New Trial

"Why the jury on [the evidence in this case] brought in the verdict it did is not a question which lends itself to logical analysis."[8] This is apparent from what has already been said respecting plaintiff's clear negligence and the

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[8] *Law v. Virginia Stage Lines, Inc.*, 144 U.S. App. D.C. 115, 119, 444 F.2d 990 (1971).

discussion of the evidence which proponderates so heavily in favor of defendants.

The quest for truth and justice in both a jury and non-jury trial is both a delicate and a serious matter. The task imposes upon the trial judge the heavy responsibility to "administer justice without respect to persons and faithfully and impartially perform all duties to the best of his abilities and understanding." This ethic, in the light of the circumstances of this case, compelled an inquiry by the Court, itself, respecting whether the verdict returned here by the jury was motivated by mere whim, or whether compassion, prejudice or sympathy can properly be identified as factors involved in the thinking process of the jury. That inquiry has demonstrated strong indicia that more than one of these factors significantly affected the jury's deliberations.

Needless to say, all attorneys are not gifted with the natural talents sometimes said to be indispensable to the achievement of a reputation as an "outstanding trial lawyer." To some is given a fuller measure of ability than to others. Fortunately, however, the interests of justice in the arena of the Court demand no more from a member of the legal profession than a lawyer-like presentation of a client's case and the exercise of responsibility to assure that the attorney representing the adversary party is afforded the same opportunity.

However distressing it may be, this Court is forced to conclude that the inability of plaintiff's counsel to meet this standard generated unacceptable sympathy on the part of the jury for plaintiff's cause, while at the same time creating an atmosphere of hostility toward defendants so as to render the trial unfair and prejudicial to them.

The record of this action is replete with instances where it was necessary for the Court to instruct plaintiff's

counsel regarding asking proper foundation questions before offering exhibits into evidence. Counsel's inability in this regard as well as her lack of knowledge as to the manner of properly interrogating witnesses and the fumbling manner in which she did question witnesses were as obvious to the jury as to the Court. The apparent ineptitude of counsel for plaintiff could only have produced compassion in the minds of the jurors for the plight of plaintiff herself thus depriving defendants of the fair trial to which they were entitled. Thus for this reason too, defendants are entitled to a new trial.

It is also the conclusion of this Court that the affirmative actions and behavior of plaintiff's counsel engendered in the eyes of the jury a deep and abiding prejudice against these defendants, thereby further denying them a fair trial.

No useful purpose is to be served by detailing the numerous errors chargeable to plaintiff's counsel. It is enough to say they were repeated time and again even after the Court admonished plaintiff's counsel to cease forthwith. These errors compelled proper objections from defendants' counsel, thus putting him, as attorney for defendants, in the false light of seeming to suppress from the jury evidence which would appear to them significant for a fair appraisal of this case. The improper line of questioning engaged in by plaintiff's counsel was pursued with such abandon, it became clear that she desired to bring the alleged factual matter contained in her questions, and not the answers, to the attention of the jury. Such phrases as "traffic hearing" and "skid marks" were the more prominent content of the questions, notwithstanding that she had been informed by the Court that neither the traffic hearing nor the skid marks were relevant to the proceeding insofar as the jury was concerned.

In the course of the trial and unknown to the Court, counsel for plaintiff allowed a large poster containing the damages claimed by plaintiff and their dollar value to be in plain view of the jury. The poster was in view of the jury for some time, until opposing counsel approached the bench and requested the Court to order its removal. Although the Court, upon learning of the poster, ordered it removed, the jury had ample opportunity to read its contents and contemplate the amount of damages plaintiff's counsel had printed upon it. Several items of damage claimed on the poster were never proved. Again the jury could well have surmised that the 2-foot by 4-foot poster contained information that counsel for defendants was improperly denying to it.

In closing argument counsel for the plaintiff emphasized her contention respecting the speed of defendants' car when no accurate speed was ever established by the evidence. Through a formula of her own making counsel for plaintiff had defendant Robert Fisher going 45-50 miles per hour as he approached the intersection. Counsel also argued that skid marks at the scene of the accident were those left by the defendants' car when no testimony to establish this fact was ever introduced. In concluding her argument counsel then tied the skid marks to the alleged speed of the defendants' car to show his negligence. It is seriously doubted that the jury heeded the Court's instruction to disregard all testimony and counsel's argument to the jury respecting the skid marks.

Finally, counsel for plaintiff interrupted the Court during its instructions to the jury in violation of Rule 51 of the Rules of the Superior Court. Immediately after the Court gave the instruction on an unavoidable accident, counsel rose at counsel table and stated in the presence of

the jury and within their hearing that she objected to the instruction.[9]

Accordingly, for the reasons that plaintiff was negligent as a matter of law, the verdict was against the weight of the evidence and the conduct of counsel for plaintiff prejudiced defendants' presentation of their case, a new trial is ordered.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
JUDGE

Dated: February 5, 1973

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[Caption Omitted in Printing]

ORDER

This cause having been considered by the Court upon defendants' motion for judgment n.o.v., or, alternatively for a new trial and for a remittur of the jury verdict and upon consideration of the motions and plaintiff's opposition thereto and the Court having entered a memorandum opinion, it is by the Court this 5th day of February, 1973,

ORDERED that defendants' motion for judgment n.o.v. be and the same hereby is denied; and it is

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[9]The cumulative effect of the errors of plaintiff's counsel is now more apparent to the Court than during the course of the trial. Were it otherwise, defense counsel's motion for a mis-trial would have been granted.

FURTHER ORDERED that defendants' motion for a new trial be and the same hereby is granted; and it is

FURTHER ORDERED that defendants' motion for a remittur of the jury verdict be and the same hereby is denied as moot.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
JUDGE

Copies of the foregoing Opinion and Order have been mailed to the following:

Mrs. Rotraud M. Perry
501 D Street, N.W.
Washington, D.C. 20001

Attorney for Plaintiff

James L. Rider, Esquire
Suite 1105, Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Defendants

## APPENDIX C

(Page 7 of Respondent's Motion for Judgment Notwithstanding The Verdict.)

* * * * *

Even if we assume, *arguendo,* that the defendant was exceeding the speed limit, the evidence in this case clearly establishes that the proximate cause of the accident was the plaintiff's proceeding into the intersection.

The totality of the evidence establishes that the defendant was not negligent, that even if he was, his negligence was not a proximate cause of the accident, and that even if it was, the plaintiff was likewise negligent, which negligence was also a proximate cause of the accident. The verdict is, therefore, contrary to the evidence and to the weight of the evidence.

### III
### The Cumulative Errors Committed By Plaintiff Require A New Trial.

It is respectfully submitted that defendant should be granted a new trial because of the prejudicial effect of the numerous errors committed by plaintiff at trial. For purposes of this motion each and every objection made at trial is repeated.

### IV
### The Damages Awarded By The Jury Are Grossly Excessive.

Considering the damages proved by the Plaintiff, an award of Fifteen Thousand ($15,000.00) Dollars is grossly excessive. Defendants request a remittitur reducing the verdict to a fair and reasonable sum.

It is, therefore, respectfully urged that the Court enter a judgment for the defendants notwithstanding the verdict, * * *.

* * * * *

[Caption Omitted in Printing]

[Filed Oct. 24, 1972

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph Hannon, Superior Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is this 24th day of October, 1972.

ORDERED

That the plaintiff, Mabel McNeill, recover of the defendants, Robert Edward Fisher and Charles J. Fisher Jr., the sum of $15,000.

JOSEPH M. BURTON
Clerk Of The Court,

By: /s/ Bernard M. Hirsh
Deputy Clerk

# APPENDIX D

SUPERIOR COURT OF THE [illegible] JUDICIAL CIRCUIT

JURY LIST AND RECORD

Robert Mitchell — Date OCT 2 [illegible]

Robert Edward Fisher
vs
Charles J Fisher Jr

Judge Judge Hammond — Courtroom 128 — Bailiff Russell

JURORS

| | | | | | |
|---|---|---|---|---|---|
| 1. | [illegible] CHEEK | 99 | | 14. | CLYDE LEE JUSTICE 130 (9) |
| 2. | LEWIS EDMUNDS | 303 (1) | | 15. | [illegible] 143 |
| 3. | BERNARD HINOR | 349 (2) | | 16. | NELLIE LIVINGSTON 158 (10) |
| 4. | FRANCES PATTERSON (3) | 189 | | 17. | JAMES BRINKHART 205 (11) |
| 5. | THEO WALTON | 247 (4) | | 18. | ANN SHERRY 218 (12) |
| 6. | GEORGE COATES | 406 (5) | | 19. | GWENDOLYN C[illegible] III 295 (13) |
| 7. | [illegible] LEASTON | 263 | | 20. | BERNICE COC[illegible] III 295 |
| 8. | [illegible] LIEBOWITZ | 106 | | 21. | ALBERT ROBINSON 370 |
| 9. | [illegible] | 254 | | 22. | CLAY[illegible]STON 421 |
| 10. | JOSE ARANDA | 9 (6) | | 23. | VERA C[illegible]IN 93 |
| 11. | GEORGE BROWN | 31 (7) | | 24. | MA[illegible] 91 |
| 12. | HER[illegible] | 40 (8) | | 25. | EDW[illegible] 251 |
| 13. | [illegible] JOHNS | 69 | | 26. | ED[illegible] 251 |

Jury Sworn 11:50 AM — Lunch Recess 12:30 pm

Trial Resumed 1:45 pm — Case to Jury 10/27/72 4:12 pm Verdict $5,000 for plaintiff

Time Jury Out 18 minutes — Time of Trial

Total Time for Case ____ Hours ____ Minutes

Attorneys Edward Lacy — vs James Sipes

Court Reporter Official Court Reporter

Richard [illegible] Hand
Signature of Clerk or Deputy

Form CV 6 Jan 72

28-Hammond